

FEDERAL COURT OF AUSTRALIA

Arora v Minister for Immigration and Border Protection [2016] FCAFC 35

Appeal from: *Arora v Minister for Immigration & Anor* [2015] FCCA 2779
Singh v Minister for Immigration & Anor [2015] FCCA 2805

File numbers: NSD 1294 of 2015
NSD 1293 of 2015

Judges: **BUCHANAN, PERRAM AND RANGIAH JJ**

Date of judgment: 11 March 2016

Catchwords: **MIGRATION** – provision of bogus document – whether bogus document must be misleading or deceptive in a material particular – Public Interest Criterion 4020

Legislation: *Migration Act 1958* (Cth) s 65

Cases cited: *Batra v Minister for Immigration and Citizenship* [2013] FCA 274
Mudiyanselage v Minister for Immigration [2013] FCA 266
Singh v Minister for Immigration [2012] FCMA 145
Trivedi v Minister for Immigration and Border Protection [2014] FCAFC 42

Date of hearing: 23 February 2016

Registry: New South Wales

Division: General Division

National Practice Area: Administrative and Constitutional Law and Human Rights

Category: Catchwords

Number of paragraphs: 24

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Respondent:

Counsel for the Second
Respondent:

The second respondent filed a submitting appearance

ORDERS

NSD 1294 of 2015

BETWEEN: **SALIL ARORA**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGES: **BUCHANAN, PERRAM AND RANGIAH JJ**

DATE OF ORDER: **11 MARCH 2016**

THE COURT ORDERS THAT:

1. 1. The appeal be dismissed.
2. 2. The Appellant pay the First Respondent's costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

ORDERS

NSD 1293 of 2015

BETWEEN: **GURNEET SINGH**
 Appellant

AND: **MINISTER FOR IMMIGRATION AND BORDER**
 PROTECTION
 First Respondent

ADMINISTRATIVE APPEALS TRIBUNAL
Second Respondent

JUDGE: **BUCHANAN, PERRAM AND RANGIAH JJ**

DATE OF ORDER: **11 MARCH 2016**

THE COURT ORDERS THAT:

3. 1. The appeal be dismissed.
4. 2. The Appellant pay the First Respondent's costs.

Note: Entry of orders is dealt with in Rule 39.32 of the *Federal Court Rules 2011*.

REASONS FOR JUDGMENT

THE COURT:

1. Introduction

1 There are two appeals before the Court, one brought by Mr Arora and one by Mr Singh. It is convenient to deal first with the position of Mr Arora.

2 Mr Arora is a citizen of India who was born in Amritsar in 1986. He arrived in Australia in 2006 following which he was issued with a series of student visas entitling him to study in Australia. The last of these was issued in 2008. During this time, Mr Arora acquired qualifications from a college in Melbourne, where he resides. On 20 January 2009 he applied for a skilled visa, more formally, a Skilled (Residence) (Class VB, subclass 886) Visa. One of the requirements for this visa was that a ‘relevant assessing authority’ should have assessed the skills of the person applying for it as suitable for the nominated occupation.

3 The occupation nominated by Mr Arora in his visa application was that of pastry cook. He accompanied his application with a letter dated 8 May 2008 from a section of the Department of Education, Employment and Workplace Relations known as Trades Recognition Australia (‘TRA’). This letter certified that for migration purposes, Mr Arora was qualified for the occupation of pastry cook. In these reasons we refer to this letter as the ‘skills assessment’.

4 There were two deficiencies with the skills assessment. The first was that it had been procured by Mr Arora submitting to the TRA a letter from a cake shop which suggested that he had done 900 hours of work experience at the shop. It subsequently transpired that a third party had issued false letters from this cake shop confirming that visa applicants had done work experience at it. That person was convicted of a criminal offence in relation to that practice. This suggested, although it did not emphatically establish, that Mr Arora had submitted false documentation to the TRA in consequence of which it had issued its skills assessment.

5 The second deficiency was that, as a result of a quite unrelated administrative oversight, the TRA was not at the time that it issued the skills assessment to Mr Arora in fact a ‘relevant assessing authority’ within the meaning of the *Migration Regulations 1994* (Cth) (‘the Regulations’). It was not in dispute before this Court that this meant that the skills

assessment was invalid. In a nutshell, what appears to have happened is that Mr Arora used a false document to procure the issue of a skills assessment from a body which had no power to issue it.

6 6 The delegate considering his application for the visa, and on a subsequent review the Migration Review Tribunal, concluded that Mr Arora was not eligible for the visa because he had submitted a ‘bogus document’ (a defined concept) to the delegate. The bogus document was said to be the skills assessment issued by the TRA, not the false reference.

7 7 A judicial review proceeding seeking to quash the Tribunal’s decision failed in the Federal Circuit Court: *Arora v Minister for Immigration and Border Protection* [2015] FCCA 2779. It is from that Court’s orders that Mr Arora now appeals to this Court.

8 8 For the reasons which follow, the appeal should be dismissed with costs.

2. Bogus Documents

9 9 A visa can only be granted by the Minister or his delegate under s 65 of the *Migration Act 1958* (Cth) (‘the Act’) if the criteria for the visa involved have been satisfied: s 65(1). In the case of Mr Arora’s visa, the relevant criteria were specified in various clauses of Schedule 2 to the Regulations. Clause 886 of Schedule 2 required that at the time of the delegate’s decision the applicant satisfy ‘PIC 4020’ (an abbreviation for public interest criterion). The relevant portions of PIC 4020 were as follows:

‘4020 (1) There is no evidence before the Minister that the applicant has given, or caused to be given, to the Minister, an officer, the Migration Review Tribunal, a relevant assessing authority or a Medical Officer of the Commonwealth, a bogus document or information that is false or misleading in a material particular in relation to:

- (a) The application for the visa; or
- (b) a visa that the applicant held in the period of 12 months before the application was made.

...

- (3) To avoid doubt, subclauses (1) and (2) apply whether or not the Minister became aware of the bogus document or information that is false or misleading in a material particular because of information given by the applicant.

...

- (5) In this clause:
information that is false or misleading in a material particular

means information that is:

- (a) false or misleading at the time it is given; and
- (b) relevant to any of the criteria the Minister may consider when making a decision on an application, whether or not the decision is made because of that information.'

10 10 By the time the matter got to the Tribunal, the concept of a 'bogus document' was defined in s 5 of the Act in these terms:

'bogus document'

in relation to a person, means a document that the Minister reasonably suspects is a document that:

- (a) (a) purports to have been, but was not, issued in respect of the person; or
- (b) (b) is counterfeit or has been altered by a person who does not have authority to do so, or
- (c) (c) was obtained because of a false or misleading statement, whether or not made knowingly;
- (d) ...'

(e) At the time of the delegate's decision, the concept was defined in s 97 of the Act in materially the same terms.

11 11 The effect of sub-clause (c) of the definition is that if the delegate or the Tribunal reasonably suspected that the TRA issued its skills assessment because of false or misleading statements in the reference purportedly from the cake shop then the TRA assessment will itself be a bogus document, and this is so even if Mr Arora did not know that the cake shop reference was false: see *Trivedi v Minister for Immigration and Border Protection* [2014] FCAFC 42 at [1], [23]-[28] and [56].

12 12 Unsurprisingly, the Tribunal (and before it, the delegate) reached the conclusion that the skills assessment was a bogus document within the meaning of s 5. That conclusion was not challenged before the Federal Circuit Court and it is not in dispute on this appeal. Nor was it in dispute that the skills assessment, as a bogus document, was provided to the Department with Mr Arora's application. As a result of cl 886.224 the critical questions related to what the delegate and thereafter the Tribunal thought about PIC 4020 at the time of their respective decisions.

13 13 There are, in fact, only two issues on the appeal. The first is whether the bogus document's falsity must be material to the outcome of an applicant's visa application. Mr

Arora submits that because the TRA had no power to issue a skills assessment, the skills assessment cannot have been material to the outcome of his visa application and, therefore, the fact that it was a bogus document ought not to matter. To this end, he submits that what PIC 4020(1) refers to is the composite expression ‘a bogus document or information that is false or misleading in a material particular’. The argument is that the words ‘false or misleading in a material particular’ qualify the words ‘bogus document’ and not just the word ‘information’. On this view, not only must the document be ‘bogus’, it must be false or misleading in a *material* particular. That was said to be significant because of the invalidity of the skills assessment. The second issue was whether, assuming that construction argument was correct, the fact that the skills assessment was invalid also meant that it *could not be* material.

14 14 The appeal can be resolved by reference to the proper construction of PIC 4020(1) without deciding whether the submission about materiality is correct: cf. *Singh v Minister for Immigration* [2012] FCMA 145.

15 15 Properly construed there is no requirement in PIC 4020(1) that the falsity of a bogus document should be relevant to the criteria that the Minister is considering. PIC 4020(1) and the definition in s 5 address separately the falsity, respectively, of information (in PIC 4020(5)) and bogus documents (in s 5). Each has its own particular regime. The definition of ‘bogus document’ in s 5 is not concerned with the truth or otherwise of statements but with the reliability of documentation. It would be a most unworkable outcome if the Minister could not rely on the fact that a document was counterfeit but had to consider, in turn, whether the statements contained in it were, in any event, correct and otherwise relevant to the matters he had to consider. As a matter of formality, it is the definition of ‘bogus document’ in s 5 which will apply unless ‘the contrary intention appears’. For the reasons just given, the contrary intention does not appear and the concept of a ‘bogus document’ is not subject to the gloss suggested by Mr Arora.

16 16 Single judges of this court have previously reached the conclusion that a skills assessment can be a bogus document: see *Mudiyanselage v Minister for Immigration* [2013] FCA 266; *Batra v Minister for Immigration and Citizenship* [2013] FCA 274 at [61] per Murphy J. The contrary was not suggested on this appeal. Further, in *Mudiyanselage* Tracey J specifically considered whether the ‘false or misleading in a material particular’ requirement in relation to ‘information’ in PIC 4020(1) applied to bogus documents and

concluded that it did not (at [23]-[31]). As will be apparent, we respectfully agree with that conclusion.

17 In those circumstances, it is not correct that the falsity of a bogus document needs to be relevant to the criteria to be considered by the Minister on the visa application.

18 For those reasons, Mr Arora's appeal should be dismissed with costs.

3. Mr Singh's Appeal

19 Mr Singh was born in 1987 in Ludhiana in India. He arrived in Australia for the first time in 2007. On 21 April 2009 he applied for a skilled visa of the same class as Mr Arora's (although it immaterially related to a different subclass). Like Mr Arora, his nominated occupation was that of pastry cook. And, like Mr Arora, it appears that he submitted a false work reference from a cake shop stating that he had done 900 hours of work experience. Both the delegate considering his visa application and the Tribunal concluded that Mr Singh was not eligible for the visa because he had submitted a bogus document to the delegate. A judicial review proceeding seeking to quash the Tribunal's decision failed in the Federal Circuit Court: *Singh v Minister for Immigration and Border Protection* [2015] FCCA 2805. It is from that Court's orders that Mr Singh appeals to this Court.

20 The only material difference between the two cases is the identity of the cake shop which does not seem to us to matter. The false document was provided to the TRA which on 19 March 2008 issued a skills assessment. As in Mr Arora's case, it appears that the skills assessment was invalid because at the time it was issued the TRA had not been appointed as a relevant assessing authority. Mr Singh provided the invalid TRA skills assessment, as well as the false reference, to the Minister with his visa application.

21 Again, it was not in dispute that the TRA skills assessment was a bogus document within the meaning of s 5.

22 The argument advanced on behalf of Mr Singh was the same as that advanced on behalf of Mr Arora; namely, that a bogus document under PIC 4020(1) had to be false or misleading in a material particular. For the reasons already given we reject that argument.

23 The appeal should be dismissed with costs.

4. Result

24 24 In each appeal, we will order that the appeal be dismissed with costs.

I certify that the preceding twenty-four (24) numbered paragraphs are a true copy of the Reasons for Judgment herein of the Honourable Justices Buchanan, Perram and Rangiah.

Associate:

Dated: 11 March 2016